IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 687 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

JODHABHAI VIHABHAI RAJPUT (GOHIL)
Versus
THE STATE OF GUJARAT

==========

Appearance :
MR MEHUL SHARAD SHAH for the Petitioner
MR HL JANI, ADDITIONAL PUBLIC PROSECUTOR for the Respondent

==========

CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 15/11/2006

ORAL JUDGMENT

1. The petitioner – original accused is before this Court praying that the judgment and order dated 22.12.2005 passed by the learned Judicial Magistrate First Class, Vav-Tharad (“JMFC”, for short) in Criminal Case No.315 of 1990 be quashed and set aside along with

judgment and order dated 13.10.2006 passed by the learned Additional Sessions Judge, 3rd Fast Track Court, Deesa, Camp at Deodar in Criminal Appeal No.12 of 2005, which confirmed the judgment and order of the learned JMFC.

2. The petitioner was charged for offence under Sections 332, 337 and 427 of the Indian Penal Code ("IPC", for short). The learned JMFC after appreciating the evidence led before him, recorded the conviction under aforesaid three Sections of the IPC and awarded one year's S.I., fine of Rs.800/- and in default, three months S.I. for offence under Section 332 of the IPC.

For the offence under Section 337 of the IPC, the learned JMFC awarded two months S.I., fine of Rs.100/- and in default, 12 days imprisonment.

For the offence under Section 427 of the IPC, the learned JMFC was pleased to award sentence of six months, fine of Rs.100/- and in default, S.I. for one month.

3. The Appeal was carried to the Court of learned Additional Sessions Judge, 3rd Fast Track Court, Deesa, Camp at Deodar. The learned first appellate Judge was pleased to uphold the conviction and the sentence. The learned Additional Sessions Judge was not convinced of any of the points urged seeking interference at the hands

of the learned first appellate Judge.

4. Mr.Mehul S.Shah, learned advocate for the petitioner submitted that inadvertently, the learned advocates representing the case of the present petitioner – original accused before the learned JMFC as well as before the learned first appellate Judge did not focus their attention to the provisions of The Probation of Offenders Act, 1958 (“the Act”, for short) nor to Section 360 of the Criminal Procedure Code (“the Code”, for short) and they focus their attention only to merits of the case. They focused their attention only to the merits of the case. The case of the present petitioner – original accused was that he was wrongly roped in the case.

Mr.Shah, learned advocate for the petitioner submitted that besides the entitlement of the petitioner - accused of the benefits under the provisions of the Act and Section 360 of the Code, the petitioner has a good case on merits. He submitted that if the Court is to grant the petitioner the benefits of the provisions of the Act and Section 360 of the Code, he has instructions not to press the case on merits.

5. The learned advocate for the petitioner submitted that in view of the admitted 'age' of the petitioner in

the FIR, which is less then 21 years and in light of the provisions of Section 6 of the Act, the learned JMFC ought not to have sentenced him for imprisonment. Section 6 of the Act reads as under:

> "6. Restrictions on imprisonment of offenders under twenty-one years of age. -
>
> (1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of offence and the character of the offender, it would not be desirable to deal with him under section 3 o section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons by doing so.
>
> (2) For the purpose of satisfying itself whether it would not be desirable to deal under section 3 or section 4 with an offender referred to in sub-section (1) the court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender."

In support of his submission, the learned advocate for the petitioner relied upon a decision of the Hon'ble the Apex Court in the matter of **MUSAKHAN AND OTHERS VS.**

STAE OF MAHARASHTRA, reported in AIR 1976 Supreme Court 2566. The learned advocate drew attention of the Court to paragraph No.7 of the judgment which reads as under:

> "7. Taking A-4 we find that he was a young man of 20 years in 1968 when the occurrence took place and he is the brother of A-11 and A-12. The only evidence of his participation in the incident at the Bharat Lodge consists of P.W. 1 Prakash and P.W. 16 Vishwanath, So far as P.W. 16 is concerned his evidence has been rejected as he was not able to identify the appellant at a test identification parde. Further more, in view of the evidence of P.W. 16 extracted above, it would appear that he does not mention A-4 as one of the persons who had taken part in removing the cash box from the counter. In these circumstances, therefore, A-4 can only can be convicted at the most under Sections 149/425, I.P.C. As this appellant does not appear to have taken any part either in the raid which was made at the Engineering College hostel or at the chawl he can only be responsible for the mischief which was caused at the Bharat Lodge. As his conviction under Sections 395/149 fails, the appellant can only be convicted under Sections 149/425, I.P.C. The other convictions and sentences recorded against him are set aside. As, however, the appellant was a boy of 20 years, his case clearly falls within the purview of the Probation of Offenders Act, 1958. The Probation of Offenders Act is a social legislation which is meant to reform juvenile offenders so as to prevent them for becoming hardened criminals by providing an educative and reformative treatment to

> them by the Government Unfortunately, though the provisions of Section 6 of the Probation of Offenders Act are mandatory, the Courts do not appear to make wise use of these provisions which is necessary to protect our younger generation from becoming professional criminals and, therefore, a menace to the society. It may be that the appellant A-4 was not dealt with under the provisions of Sec. 6 of the Probation of Offenders Act because of the charge under Section 395, I.P.C. but that charge having failed, there is no impediment now in his being dealt with under the provisions of Section 6 of the Probation of Offenders Act. In these circumstances, therefore we would set aside the convictions and sentences imposed on A-4 Musa Khan and direct that he be released on his entering into a bond with two sureties of Rs. 500/- each for a period of one year in order to keep the peace and be of good behaviour. The appellant will report to the Probation Officer appointed within the jurisdiction of the place where he resides."

The learned advocate submitted that this decision of the Hon'ble the Apex Court is applicable to the facts of the present case. He submitted that the age of the petitioner – original accused was less then 21 years at the time of occurrence of the alleged offence. The learned Advocate submitted that the case of the petitioner stands on a much stronger footing as according to birth certificate of the petitioner, his age was much less then what was recorded in the FIR. He submitted

that even if the age mentioned in the FIR is taken as his correct age, he is entitled to the benefits under Section 6 of the Act.

6. The learned advocate for the petitioner next relied upon a decision of the Hon'ble the Apex Court in the matter of **DARSHAN KUMAR VS. SECRETARY, MUNICIPAL CORPORATION, JABALPUR AND ANOTHER**, reported in AIR 1973 Supreme Court 906.

The learned advocate submitted that this judgment is one paragraph judgment. The same is quoted for the ready reference:

> “After hearing counsel for the parties the following order must be made in this case in view of the decision of this Court in 1964 (7) SCR 676 = (1965 (1) Cri LJ 360) when the birth certificate produced shows that the appellant was below 21 years of age at the time of the commission of the offence :-
>
> "The order of the High Court is set aside and the High Court is directed to make an order under Section 6 of the Probation of Offenders Act, 1958 and if it so desires remand the case to the Sessions Court or the trial Court for doing so. The appeal shall stand allowed accordingly. The appellant who was released on bail by this Court can apply to the High Court now for being released on bail."
>
> Ordered accordingly.”

The learned advocate for the petitioner next relied upon a decision of this Court in the matter of **KALAJI PRAHLADJI KESHAJI VS. STATE OF GUJARAT**, reported in 1992 (2) G.L.H. 88. The relevant extract of the judgment is as under:

> "(B) Probation of Offenders Act, 1958 – S. 6 – Offence under S. 304A I.P.C. - On the date of the offence accused was 19 years of age – Accused sentenced to pay a fine of Rs. 3000/- out of which, amount of Rs. 2500/- ordered to be given to the dependents of the deceased.
>
> " Undisputedly the accused was of 19 years of age on the date when the offence was committed. Therefore, admittedly he was below 21 years of age and therefore without recording the special reasons and without considering the report of the Probation Officer, no sentence of imprisonment can be given. He is very young boy and therefore, out of negligence and sheer mischief this offence has been committed by him. Therefore, he deserves some sympathy and lenient treatment in the matter. It is true that one human life is lost on account of his negligence, but the justice can be met by imposing proper fine on him and also passing the order for compensation out of it. Looking to the facts and circumstances of the case, after hearing the learned Advocate Mr.Soni on the point of sentence, it appears that the fine of Rs. 3000/- would meet with the ends of justice for the offence under S. 304A. Accordingly, the appeal filed by the appellant is

allowed. His conviction and sentence for the offences punishable under S. 304A Part II is hereby set aside but the appellant is sentenced for offence under S. 304A of the I.P.C. and he is sentenced to pay a fine of Rs. 3000/- and when the fine is recovered, out of the said fine, an amount of Rs.2,500/- may be given to the dependents of the deceased."

7. The learned advocate for the petitioner submitted that in a case of **BHOOP RAM VS. STATE OF U.P.**, reported in AIR 1989 Supreme Court 1329, the controversy was regarding the proof of age of the accused and the Hon'ble the Apex Court was pleased to observe with regard to school certificate and the medical certificate as under:

"(A) ..... - School certificate cannot be rejected on surmise that it is not unusual for parents to understate age of their children at time of school admission – Medical certificate is based on estimate and possibility of error cannot be ruled out."

In the case on hand, that question does not arise for consideration, for the reason that even as per the case of the prosecution, the age of the accused was 19 years and if that is taken to be true, then also, he is entitled for benefits under Section 6 of the Act.

8. The incident alleged to have taken place in the year 1990. The case was tried and the petitioner is convicted

by the learned JMFC by judgment and order dated 22.12.2005, i.e. almost after a decade and half and it is that conviction which is confirmed by the learned appellate Judge by his judgment and order dated 13.10.2006. Assuming that the petitioner is guilty of the offence for which he is convicted then also, looking to the fact that for all these long years, i.e. after the alleged incident of 1990, no other incident is recorded against the petitioner – original accused.

It is stated by the learned advocate for the petitioner that after the alleged incident, the petitioner got married and is blessed with four children and they are all minor. In the passage of time, he has lost his father and today, he is having the responsibility of maintaining not only his four minor children and wife but also widowed mother and aged grandmother. There is nothing on record to show that he is having criminal background which shall come in the way in grant of benefits flowing from the Act.

9. In view of the aforesaid discussion, taking into consideration contents of Section 360 of the Criminal Procedure Code, Section 6 of the Probation of Offenders Act, circumstances of the case, nature of the offence, the character of the offender, time lag, the age of the

petitioner-accused at the time of incident and the fact that there is no untoward incident has taken place during this entire period, it is deemed fit that the petitioner – accused be released on probation of good conduct.

Accordingly, the petitioner-accused is directed to be released on probation of good conduct on his entering into a bond in the sum of Rs.5,000/- (Rupees Five Thousand Only) for a period of one year, to appear and receive sentence when called upon during the period of one year. Conviction is maintained and sentence is quashed. Rule is made absolute. Revision Application is allowed.

(RAVI R.TRIPATHI, J.)

*Shitole